United States Circuit Court, Northern District of Ohio.

JOHN HAYS & CO. v. THE PENNSYLVANIA COMPANY.

Discriminations in the rates of freight charged by a railroad company to shippers, based solely on the amount of freight shipped, without reference to any conditions tending to decrease the cost of transportation, are discriminations in favor of capital, are contrary to sound public policy, violative of that equality of rights guaranteed to every citizen, and a wrong to the disfavored party, for which he is entitled to recover from the railroad company the amount of freight paid by him in excess of rates accorded by it to his most favored competitor, with interest on such sum.

The plaintiffs were engaged in mining coal at S. for sale at C. They were wholly dependent on defendants for transportation. The regular tariff between those points was $1.60 per ton, with a rebate from 30 to 70 cents per ton to persons shipping over 5000 tons during a year; the amount of rebate being graduated according to the quantity shipped. Under this schedule plaintiffs were required to pay higher rates on the coal shipped by them than were exacted from other and rival parties who shipped larger quantities. In an action to recover the excess paid by plaintiffs. *Held*, that such discrimination was illegal, and that plaintiffs were entitled to recover the amount paid by them in excess of the rate accorded to their most favored competitor.

Nicholson v. *G. W. Railroad Co.*, 5 C. B. (N. S.) 436, distinguished.

MOTION for new trial.

The plaintiffs were, for several years next before the commencement of this suit, engaged in mining coal at Salineville, and near defendant's road, for sale in the Cleveland market. They were wholly dependent on the defendant for transportation. Their complaint set forth that the defendant discriminated against them, and in favor of their competitors in business, in the rates charged for carrying coal from Salineville to Cleveland. The defendant traversed this allegation. On the trial, it appeared in evidence that defendant's regular price for carrying coal between the points mentioned, in 1876, was $1.60 per ton, with a rebate of from 30 to 70 cents per ton to all persons or companies shipping 5000 tons or more during the year—the amount of rebate being graduated by the quantity of freight furnished by each shipper. Under this schedule the plaintiffs were required to pay higher rates on the coal shipped by them than were exacted from other and rival parties who shipped larger quantities. The defendant contended, if the discrimination was made in good faith, and for the purpose of stimulating its production and increasing its tonnage, it was both reasonable and just and within the discretion confided

by law to every common carrier. The court, however, entertained the contrary opinion, and instructed the jury that the discrimination complained of and proven, as above stated, was contrary to law and a wrong to plaintiffs for which they were entitled to recover the damages resulting to them therefrom, to wit, the amount paid by the plaintiffs to the defendant for the transportation of their coal from Salineville to Cleveland in excess of the rates accorded by defendant to their most favored competitors, with interest on such sum. The jury, under these instructions, found for the plaintiffs, and assessed their damages at $4585. The defendant thereupon moved for a new trial, on the ground that the instructions given were erroneous.

The opinion of the court was delivered by

BAXTER, C. J.—A reference to recognised elementary principles will aid in a correct solution of the problem. The defendant is a common carrier by rail. Its road, though owned by the corporation, was nevertheless constructed for public uses, and is, in a qualified sense, a public highway. Hence everybody constituting a a part of the public, is entitled to an equal and impartial participation in the use of the facilities it is capable of affording. Its ownership by the corporation is in trust as well for the public as for the shareholders; but its first and primary obligation is to the public. We need not recount all these obligations. It is enough for present purposes to say that the defendant has no right to make unreasonable and unjust discriminations. But what are such discriminations? No rule can be formulated with sufficient flexibility to apply to every case that may arise. It may, however, be said that it is only when the discrimination enures to the undue advantage of one man, in consequence of some injustice inflicted on another, that the law intervenes for the protection of the latter. Harmless discrimination may be indulged in. For instance, the carrying of one person, who is unable to pay fare, free, is no injustice to other passengers who may be required to pay the reasonable and regular rates fixed by the company. Nor would the carrying of supplies at nominal rates to communities scourged by disease, or rendered destitute by floods or other casualty, entitle other communities to have their supplies carried at the same rate. It is the custom, we believe, for railway companies to carry fertilizers and machinery for mining and manufacturing purposes to be employed along the

lines of their respective roads to develop the country and stimulate productions, as a means of insuring a permanent increase of their business, at lower rates than are charged on other classes of freight, because such discrimination, while it tends to advance the interests of all, works no injustice to any one. Freight carried over long distances may also be carried at a reasonably less rate per mile than freight transported for shorter distances, simply because it costs less to perform the service. For the same reason passengers may be divided into different classes and the price regulated in accordance with the accommodations furnished to each, because it costs less to carry an emigrant, with the accommodations furnished to that class, than it does to carry the occupant of a palace car. And for a like reason an inferior class of freight may be carried at a less rate than first-class merchandise of greater value and requiring more labor, care and responsibility in the handling. It has been held that twenty separate parcels, done up in one package and consigned to the same person may be carried at a less rate per parcel than twenty parcels of the same character consigned to as many different persons at the same destination, because it is supposed that it costs less to receive and deliver one package containing twenty parcels to one man, than it does to receive and deliver twenty different parcels to as many different consignees.

Such are some of the numerous illustrations of the rule that might be given. But neither of them is exactly like the case before us, either in its facts or principles involved. The case of *Nicholson* v. *G. W. R. Co.*, 5 C. B. (N. S.) 366, is in its facts more nearly like the case under consideration than any other case we have been able to find. This was an application, under the Railway and Traffic Act, for an injunction to restrain the railroad company from giving lower rates to the Ruabon Coal Company than were given to the complainant in that case, in the shipment of coal, in which it appeared that there was a contract between the railroad company and the Ruabon Coal Company, whereby the coal company undertook to ship for a period of ten years, as much coal for a distance of at least one hundred miles over defendant's road, as would produce an annual gross revenue of 40,000*l.* to the railroad company, in fully-loaded trains, at the rate of seven trains per week. In passing on these facts the court said that in considering the question of undue preference the fair interest of the

railroad company ought to be taken into the account; that the preference or prejudice referred to by the statute, must be undue or unreasonable to be within the prohibition; and that, although it was manifest that the coal company had many and important advantages in carrying their coal on the railroad as against the complainant and other coal owners, still the question remained, were they undue or unreasonable advantages? And this the court said mainly depended on the adequacy of the consideration given by the coal company to the railroad company for the advantages afforded by the latter to the coal company. And because it appeared that the cost of carrying coal in fully-loaded trains, regularly furnished at the rate of seven trains per week, was less per ton to the railway company than coal delivered in the usual way, and at irregular intervals, and in unequal quantities, in connection with the coal company's undertaking to ship annually coal enough over the defendant's road, for at least a distance of one hundred miles, to produce a gross revenue to the railroad of 40,000*l.*, the court held that the discrimination complained of in the case was neither undue nor unreasonable, and therefore denied the application.

The case seems to have been well considered, and we have no disposition to question its authority. Future experience may possibly call for some modification of the principle therein announced. But this case calls for no such modification, inasmuch as the facts of that case are very different, when closely analyzed, from the facts proven in this one. In the former, the company, in whose favor the discrimination was made, gave, in the judgment of the court, an adequate consideration for the advantages conceded to it under and in virtue of its contract. It undertook to guaranty 40,000*l.* worth of tonnage per year for ten years to the railroad company, and to tender the same for shipment in fully-loaded trains at the rate of seven trains per week. It was in consideration of these obligations—which in the judgment of the court enabled the railroad company to perform the service at less expense—the court held that the advantages secured by the contract to the coal company were neither undue nor unreasonable. But there are no such facts to be found in this case. There was in this case no undertaking by any one to furnish any specific quantity of freight at stated periods; nor was any one bound to tender coal for shipment in fully-loaded trains. In these particulars the

plaintiffs occupied common ground with the parties who obtained lower rates. Each tendered coal for transportation in the same condition and at such times as suited his or their convenience. The discrimination complained of rested exclusively on the amount of freight supplied by the respective shippers during the year. Ought a discrimination resting exclusively on such a basis to be sustained? If so then the business of the country is, in some degree, subject to the will of railroad officials; for, if one man engaged in mining coal and dependent on the same railroad for transportation to the same market, can obtain transportation thereof at from 25 to 50 cents per ton less than another competing with him in business, solely on the ground that he is able to furnish and does furnish the larger quantity for shipment, the small operator will sooner or later be forced to abandon the unequal contest and surrender to his more opulent rival. If the principle is sound in its application to rival parties engaged in mining coal, it is equally applicable to merchants, manufacturers, millers, dealers in lumber and grain, and to everybody else interested in any business requiring any considerable amount of transportation by rail; and it follows that the success of all such enterprises would depend as much on the favor of railroad officials as upon the energies and capacities of the parties prosecuting the same.

It is not difficult with such a ruling to forecast the consequences. The men who control railroads would be quick to appreciate the power with which such a holding would invest them, and, it may be, not slow to make the most of their opportunities, and perhaps tempted to favor their friends to the detriment of their personal or political opponents; or demand a division of the profits realized from such collateral pursuits as could be favored or depressed by discriminations for or against them; or else, seeing the augmented power of capital, organize into overshadowing combinations, and extinguish all petty competition, monopolize business, and dictate the price of coal and every other commodity to consumers. We say these results *might* follow the exercise of such a right as is claimed for railroads in this case. But we think no such power exists in them; they have been authorized for the common benefit of every one, and cannot be lawfully manipulated for the advantage of any class at the expense of any other. Capital needs no such extraneous aid. It possesses inherent advantages, which cannot be taken from it. But it has no just claim, by reason of

its accumulated strength, to demand the use of the public highways of the country, constructed for the common benefit of all, on more favorable terms than are accorded to the humblest of the land; and a discrimination in favor of parties furnishing the largest quantities of freight, and solely on that ground, is a discrimination in favor of capital, and is contrary to a sound public policy, violative of that equality of right guarantied to every citizen, and a wrong to the disfavored party, for which the courts are competent to give redress.

The motion, therefore, for a new trial, will be denied and a judgment entered on the verdict for the damages assessed, and the costs of the suit.

WELKER, D. J., concurred.

The carriage of traffic free, or at reduced rates, suggests for consideration:

I. Gratuitous transportation.

II. Public Policy.

III. Reasonable and unreasonable discriminations by carriers, and the relation between the expense of transportation and the price chargeable for it.

IV. Discriminations in traffic rates based upon differences in traffic quantities.

I. GRATUITOUS TRANSPORTATION.—It is the duty of the operators and managers of corporate common carriers not to carry traffic gratuitously that otherwise would be a profitable source of revenue. They owe this duty to shareholders and bond purchasers, whose contributions of capital have been made with the expectation and right of receiving returns in the shape of dividends and interest. This right, it is obvious, would be defeated if gratuitous transportation was permitted. They owe the duty also to the public. They are under legal obligation to deal equally and without unreasonable discrimination with all persons. The cases, therefore, wherein common carriers may carry gratuitously are exceptional. They are not to be considered in settling the propriety of traffic charges or discriminations. Upon this point Mr. Justice DOE, of New Hampshire, says: "This question may be made unnecessarily difficult by an indefiniteness, confusion and obscurity of ideas that may arise when the public duty of a common carrier, and the correlative common right to his reasonable service for a reasonable price are not clearly and broadly distinguished from a matter of private charity. If A. receives as a charity, transportation service without price, or for less than a reasonable price, from B. who is a common carrier, A. does not receive it as his enjoyment of the common right; B. does not give it as a performance of his public duty; C., who is required to pay a reasonable price for a reasonable service, is not injured; and the public, supplied with reasonable facilities and accommodations on reasonable terms, cannot complain that B. is violating his public duty. There is in such a case no discrimination, reasonable or unreasonable, in that reasonable service for a reasonable price which is a common right. A person who is a common carrier may devote to the needy, in any necessary form of relief, all the reasonable profits of his business. He has the same right that any one else has to give money

or goods or transportation to the poor. But it is neither his legal duty to be charitable at his own expense, nor his legal right to be charitable at the expense of those whose servant he is. If his reasonable compensation for certain carriage is $100, and his just profit, not needed in his business, is one-tenth of that sum, he has $10 which he may legally use for feeding the hungry, clothing the naked or carrying those in poverty, to whom transportation is one of the necessities of life, and who suffer for lack of it. But if he charges the $10 to those who pay him for their transportation, if he charges them $110 for $100 worth of service, he is not benevolent himself, but he is undertaking to compel those to be benevolent who are entitled to his service; he is violating the common right of reasonable terms, which cannot be increased by compulsory contributions for any charitable purpose. So, if he carries one or many for half the reasonable price, and reimburses himself by charging others more than the reasonable price, he is illegally administering, not his own, but other people's charity. And when he attempts to justify an instance of apparent discrimination on the ground of charity, it may be necessary to ascertain whose charity was dispensed—whether it was his, or one forced by him from others, including the party complaining of it:" *McDuffee* v. *Railroad*, 52 N. H. 452.

An application of these remarks suggests itself when one recalls the amount of transportation gratuitously given to journalists, lawyers, politicians, friends and families of railway officials, and other "deadhead" persons and property, in some instances requiring whole trains for their carriage. The loss and expense thus incurred are met by maintaining rates sufficiently high to pay ordinary expenses, dividends and interest, and "deadhead" expenses besides. Thus is the shipping public compelled to pay for carriers' generosity (or charity). The true way would be to leave "deadhead" expenses entirely out of consideration in fixing rates, and to deduct them from the dividends of shareholders. If they or the men they select to manage their companies wish to be generous or charitable, let them pay for the privilege themselves, and not out of the pockets of people compelled to patronize railways. Or if it be the duty of the public to furnish gratuitous transportation, let it be established by law what persons and property are entitled to free carriage, and when and why they are entitled to it. Then let the expense be paid out of the public purse through some recognised governmental agency, either state or national, in order that it may be borne equally by all taxpayers, and not by the few whose business requires them to pay freight to railway carriers, or by the still fewer number (if, indeed, there be any such) who happen to be stockholders in corporate carriers, and who pay out of their own pockets the expense of carrying free the objects of their generosity or charity. Under the present system the expense of gratuitous transportation is wholly borne by that portion of the public who ship goods and pay freight. Under a system equitable and just it ought to be borne either by the stockholders of carrying companies, or by the whole public at large, accordingly as the generosity or charity of free transportation is referrable to the one or to the other.

II. PUBLIC POLICY.—With reference to transportation, free or at reduced rates, public policy has received a governmental expression as to one class of citizens, namely, soldiers. Their letters may be transmitted by mail without prepayment. Their clothing may be transmitted by mail at reduced rates, and they themselves, when discharged from service, are furnished free transportation to their homes. There are probably good reasons for this discrimination by the government, and reasons as good or

better justify railway companies in carrying free the persons, property and families of immigrants who intend to purchase and settle upon the lands of such railways. The encouragement of immigration, and the settlement and development of a new country warrant such discrimination, as well as that by which agricultural implements are carried at reduced rates or free, as mentioned in the opinion in the principal case.

III. REASONABLE AND UNREASONABLE DISCRIMINATION; AND HEREIN OF THE RELATION BETWEEN THE EXPENSE OF TRANSPORTATION AND THE PRICE CHARGEABLE FOR IT.—Dismissing as irrelevant and exceptional those cases wherein charity, and those whercin what may perhaps not inaptly be termed railway public policy, warrants the carrier either in making no traffic charge at all or in making one at a reduced rate, we come to the cases wherein the traffic charge is determined simply by a business contract between the common carrier on one side and the shipper on the other—a contract unaffected by such considerations of charity or of public policy as are above set forth. Here may well be quoted another extract from the ablest judicial opinion extant, relating to carriers' discriminations, namely, the opinion by Mr. Justice DOE, of New Hampshire, in *McDuffee* v. *Railroad*, *supra*. That jurist says: "The common and equal right is to reasonable transportation service for a reasonable compensation. Neither the service nor the price is necessarily unreasonable because it is unequal, in a certain narrow, strict, and literal sense; but that is not a reasonable service, or a reasonable price, which is unreasonably unequal. The question is not merely whether the service or price is absolutely unequal, in the narrowest sense, but also whether the inequality is unreasonable and injurious. There may be acts of charity; there may be different prices for different kinds or amounts of service; there may be many differences of price and service, entirely consistent with the general principle of reasonable equality which distinguishes the duty of a common carrier in the legal sense, from the duty of a carrier who is not a common one in that sense. A certain inequality of terms, facilities or accommodations may be reasonable, and required by the doctrine of reasonableness, and, therefore, not an infringement of the common right." This enunciation of the general principles of law applicable to carriers' discriminations is clear and undoubtedly correct. Applying them in particular to passenger facilities, Judge DOE continues: "It may be the duty of a common carrier of passengers to carry under discriminating restrictions, or to refuse to carry those who, by reason of their physical or mental condition, would injure, endanger, disturb or annoy other passengers: and an analogous rule may be applicable to the common carriage of goods. Healthy passengers in a palatial car would not be provided with reasonable accommodations if they were there unreasonably and negligently exposed, by the carrier, to the society of small pox patients. Sober, quiet, moral and sensitive travellers may have cause to complain of their accommodations, if they are unreasonably exposed to the companionship of unrestrained, intoxicated, noisy, profane and abusive passengers, who may enjoy the discomfort they cast upon others. In one sense, both classes, carried together, might be provided with equal accommodations; in another sense they would not. The feelings not corporal, and the decencies of progressive civilization, as well as physical life, health and comfort, are entitled to reasonable accommodations. Mental and moral sensibilities, unreasonably wounded, may be an actual cause of suffering, as plain as a broken limb; and, if the injury is caused by unreasonableness of facilities or accommodations (which are synony-

mous with unreasonableness of service), it may be as plain a legal cause of action as any bodily hurt, commercial inconvenience or pecuniary loss. To allow one passenger to be made uncomfortable by another committing an outrage, without physical violence, against the ordinary proprieties of life and the common sentiments of mankind, may be as clear a violation of the common right, and as clear an actionable neglect of a common carrier's duty, as to permit one to occupy two seats while another stands in the aisle. Although reasonableness of service or price may require a reasonable discrimination, it does not tolerate an unreasonable one; and the law does not require a court or a jury to waste time in a useless investigation of the question whether a proved injurious unreasonableness of service or price was in its intrinsic or in its discriminating quality. The main question is, not whether the unreasonableness was in this or that, but whether there was unreasonableness, and whether it was injurious to the plaintiff."

The discriminations in passenger facilities noted above are obviously just, and are readily made without wronging any one. More difficulty is experienced in applying the principle of discrimination justly in fixing rates. A railway rate is a charge for a specific railway service. What, in justice to all parties, should be the amount of the rate, will depend upon the quantity and quality of the service, and these in turn depend upon many things, such as the cost of the railway, its works and equipment, gradient, mileage, fuel expenses, transit and terminal expenses, including the cost of loading, insuring, supervising, unloading, storing and delivering the goods, and bulk and certainty of traffic. A variation in any of these items will warrant a corresponding variation in rates. Nor is it impossible to determine with accuracy and precision the allowance to be made on account of any of these items. It is certainly difficult, but railway experts can and do determine it. Carriers' discriminations in charges arising from the causes above noted, may, therefore, be expected, and, when reasonable, may be accepted with confidence in their justice.

It is to be remembered that discrimination is the rule, not the exception, and that when reasonable, it is right, not wrong. It is only when the discrimination is unreasonable that it is objectionable and illegal.

Railways always will charge more for carrying small parcels to numerous consignees than for carrying full train loads to one person; and for going up and down hills than for going across level prairies. These, and many other considerations affecting the expense of transportation, readily warrant reasonable discriminations in the cost of it.

But discriminations in transportation prices must correspond with differences in transportation expenses. There is a relation just, recognised, established by law, and to be observed by all, between the expense of carrying traffic on the one hand, and the price chargeable for it on the other. This truth is negatively expressed in many decisions and by many judges. A carrier cannot "exact excessive prices." *Arguendo: Churchman* v. *Tunstal*, Hardress 163. He cannot "extort what he will:" per LAWRENCE, J., *Harris* v. *Packwood*, 3 Taunt. 272; and see, *Pickford* v. *Grand Junc. Railroad Co.*, 8 Mees. & W. 377; Hawk. P. C., Book I, ch. 32, sect. 2; *Jackson* v. *Rogers*, 2 Show. 327; *Elsee* v. *Gatward*, 5 Term Rep. 149; *Chicago, &c., Railroad Co.* v. *Parks*, 18 Ill. 491; *Boson* v. *Sandford*, 1 Show. 104; *Hollister* v. *Nowlen*, 19 Wend. 239; *Colo* v, *Goodwin*, Id. 261; *Smith* v. *Chicago, &c., Railroad Co.*, 5 N. W. Rep. 242; *Brown* v. *Adams Express Co.*, 15 W. Va. 821; *Southern Express Co.* v. *Memphis, &c., Railroad Co.*, 13 Cent. L. J. 68; *Chicago, &c., Railroad Co.* v. *People*, 67 Ill. 11; *Camblos* v. *P. & R. Railroad Co.*, 4 Brews. 563.

A positive recognition of the relation between transportation-price and transportation-expense, is found in *Oxlade* v. *N. E. Railroad Co.*, (No. 1), 1 C. B. (N. S.) 454; 26 L. J. (C. P.) 129; 1 Nev. & Mac. 72, wherein the rule was clearly affirmed, that a railroad company is justified in carrying goods for one person at a less rate than that at which they carry the same discription of goods for another, if there be circumstances which render the cost to the company of carrying for the former less than the cost of carrying for the latter—a rule which pervades and is recognised in all the cases upon the subject.

IV. DISCRIMINATIONS IN TRAFFIC RATES BASED UPON DIFFERENCES IN TRAFFIC QUANTITIES.—In *Ransome* v. *Eastern Co. Railroad Co.*, 1 C. B. (N. S.) 437; 26 L. J. (C. P.) 91; 1 Nev. & Mac. 63, CRESSWELL, J., speaking of the meaning of the expressions "undue or unreasonable preference or advantage," and "undue or unreasonable prejudice or disadvantage," said: "Are these words to be construed with reference to the interests of the parties using the railway only? or may the interests of the railway owners be taken in any manner into consideration? *Ex. gr.*, if 1000 tons can be carried for a lower sum per ton per mile than 100 tons, yielding an equal profit per ton to the railway company, may they so regulate the charge as to derive such equal profit? Would the lower rate charged for the larger quantity give an undue preference?" and concluded, that "after a good deal of consideration we think the fair interests of the railway ought to be taken into the account." The court expressly refrained from deciding that a railway company may not charge different rates where coal is carried in large and small quantities.

In *Oxlade* v. *N. E. Railway Co.* (No. 1), 1 C. B. (N. S.) 454; 26 L. J. (C. P.) 129; 1 Nev. & Mac. 72, counsel for the company asked: "Are the company bound to afford the same facilities to one who sends but a single wagon load at a time that they do to one who sends the larger quantities?" CRESSWELL, J., replied: "That is a question not free from difficulty; for if a large dealer is to have his coals carried at a lower rate than a small one, he will be enabled to monopolize all the trade. It may be, however, that the company are enabled to carry at a lower rate in the one case than in the other, by reason of the difference in cost."

One branch of Oxlade's complaint was of a discrimination by the Northeastern company in refusing to carry coal for him at rates as low as ½*d.* per ton—that being the rate at which it carried coal for the Great Northern Railway Company. As to this discrimination the evidence was that the ½*d.* rate was a through rate to London; that the Great Northern found wagons (cars) for the entire distance; that the coal was taken in full train loads and very large quantities, and must be taken at a low rate or not at all; that the coal train engines were fully and uniformly loaded, and could be run without stopping or shunting (switching) with almost as much regularity as passenger trains; and it was shown that if the trains were less than fully loaded, and required stopping, switching and marshalling, the expense was greater. The court concluded, that "such circumstances enable the company to carry such coals (for the Great Northern) at a cost to them less than the cost of carrying coals for Mr. Oxlade, and it is not shown that by carrying them at a lower rate any undue or unreasonable preference is given, or any undue or unreasonable disadvantage imposed."

COCKBURN, C. J., in *Harris* v. *Cockermouth & W. Railway Co.*, 3 C. B. (N. S.) 693; 27 L. J. (N. S. C. P.) 162; 4 Jur. (N. S.) 239; 1 Nev. & Mac. 97, says: "I quite agree that this court has intimated, if not absolutely decided, that

a company is entitled to take into consideration any circumstances, either of a general or of a local and peculiar character, in considering the rate of charge which they will interpose upon any particular traffic. As, for instance, if a company were to lay down a rule that if a certain large quantity of goods were brought to be conveyed, they would charge less for the conveyance of that large quantity than they would for the conveyance of a less quantity, regard being had to the cost of working the particular line; that would be a very fair ground to justify them in making a distinction between the case of a person who sent a ton of goods at a time and the case of a person who sent only a hundred weight."

But while it may be admitted that a change in quantity may warrant a change in rates, it does not necessarily have this effect. A. may ship a much larger aggregate quantity than B., but at such inconvenient times, in such small quantities or parcels, and to such numerous consignees residing in so many different places that the expense of carrying it will greatly exceed the expense of B.'s traffic which, perhaps, comes conveniently, in one quantity, and is carried all at once a long distance to one place of consignment. There does not appear to be even a presumption indulged that A.'s large quantity entitles him to rates as cheap as B.'s rates. It must be shown, affirmatively and positively, not only that the quantity carried for A. is larger than that taken for B., but also that, by reason of A.'s quantity being the larger, the expense to the carrier is as small or smaller than the expense incurred in carrying B.'s quantity. This fact being clearly developed by testimony, the law will reduce A.'s rate to or below B.'s. Mr. Justice WILLES clearly recognised the necessity of affirmatively showing how the change in quantity affected the expense of carrying when, in *Garton* v. *Bristol & Exeter Railway Co.*, 6 C. B. (N. S.) 639; 28 L. J. (C. P.) 306; 1 Nev. & Mac. 218, with reference to *Nicholson* v. *Great Western Railway Co.* (No. 1), 5 C. B (N. S.) 366; 28 L. J. (C. P.) 89; 4 Jur. (N. S.) 1187; 1 Nev. & Mac. 121, wherein a difference in quantity was decided to warrant a difference in rate, he said: "It is a mistake to suppose that the court there intended to decide that a *prima facie* case of preference is sufficiently answered by stating a difference (for example, in quantity,) which may or may not be material, in the circumstances between the carriage for the person complaining and that for the person alleged to have been preferred, without showing that such difference practically affects the fair charge for carriage to an extent proportionate to the difference of charge actually made by the company to their several customers."

In brief, when it is undertaken to justify discriminations in rates, by referring them to any of the things that affect the expenses of carriage, the difference in quantity, in distance, or whatever else is relied upon to justify the discrimination must be shown, clearly and beyond doubt, to be material—to affect such expenses really and substantially. So far as the facts relied upon are shown either to lessen or to enlarge the expenses of transportation, to that extent, and no further, will courts hold that such facts warrant reduction or advancement of the prices of transportation.

ADELBERT HAMILTON.

Chicago.